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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

YELLOWCAKE, INC., a California corporation,  
Plaintiff,  
v.  
HYPHY MUSIC, INC.,  
Defendant.

) ) **PLAINTIFF AND  
COUNTERDEFENDANTS'**  
 ) **NOTICE OF MOTION AND  
RULE 12(b)(6) MOTION TO  
DISMISS DEFENDANT'S  
COUNTERCLAIMS;**  
 ) **MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT THEREOF**  
 ) Judge: Hon. Dale A. Drozd  
 ) Date: November 3, 2020  
 ) Time: 9:30 a.m.  
 ) Courtroom: Courtroom 5, 7th floor

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1	HYPHY MUSIC, INC.,	)
2		)
3	Counterclaimant,	)
4		)
5	v.	)
6	)	)
7	YELLOWCAKE, INC.; COLONIZE	)
8	MEDIA, INC.; JOSE DAVID	)
9	HERNANDEZ; and JESUS CHAVEZ SR,	)
10		)
11	Counterdefendants.	)
12		)

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**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that, pursuant to Federal Rule of Civil Procedure 12(b)(6), on Tuesday, November 3, 2020, at 9:30 a.m. before the Honorable Dale A. Drozd, at the Robert E. Coyle United States Courthouse, 2500 Tulare Street, Fresno, CA 93721, Courtroom 5, 7th floor, Plaintiff Yellowcake, Inc., and Counterdefendants Colonize Media, Inc., and Jose David Hernandez will move and hereby move to dismiss Defendant/Counterclaimant Hyphy Music, Inc.'s, First Amended Counterclaims numbered 1, 3, 4, 5, 6, and 7, against Plaintiff Yellowcake, Inc., and Counterdefendants Colonize Media, Inc., and Jose David Hernandez, with prejudice.

As shown below in Plaintiff/Counterdefendants' supporting Memorandum of Points and Authorities, Defendant/Counterclaimant Hyphy has failed to state a cause of action under Federal Rule of Civil Procedure 12(b)(6) for:

Direct Copyright Infringement Under 17 U.S.C. § 101 *et seq.* "as to the Los Originales Albums" (referred to herein as "Yellowcake's Copyrighted Sound Recordings") against Yellowcake and Colonize and related Temporary, Permanent, and Injunctive Relief against Yellowcake and Colonize; Intentional Interference with Prospective Business Advantage against Yellowcake and Colonize; Intentional Interference with Contractual Relations against Hernandez, Yellowcake, and Colonize;

1 Unfair Competition Under California Business and Professions Code § 17200 against  
2 Yellowcake, Colonize, and Hernandez; and Conversion against Yellowcake.

3 This motion is based on this notice of motion and the attached Memorandum of  
4 Points and Authorities, the Declaration of Seth L. Berman Esq., and all exhibits thereto,  
5 the pleadings and records filed in this action, and such further evidence and argument  
6 that may be presented before the hearing on this motion.

7 I certify that this motion is made following the conference of counsel pursuant to  
8 Section 1(C) of the Standing Order in Civil Actions, which took place on September 18,  
9 2020. The parties discussed issues concerning the merits of the First Amended  
10 Counterclaims to the extent that they pertain to the disputed Sound Recording  
11 copyrights; issues concerning the merits of the First Amended Counterclaims to the  
12 extent that they pertain to the disputed Cover Art copyrights, and whether or not  
13 Defendant/Counterclaimant Hyphy Music, Inc., would withdraw its Amended  
14 Counterclaims with respect to Plaintiff Yellowcake and Counterdefendants Colonize  
15 Music, Inc., and Jose David Hernandez. As such, the meet and confer efforts have been  
16 exhausted prior to the filing of this motion.

17  
18 Dated: October 2, 2020

Respectfully submitted,

19  
20  
21 **ABRAMS, FENSTERMAN, FENSTERMAN,  
EISMAN, FORMATO, FERRARA, WOLF &  
CARONE, LLP**

22 By: /s/ Seth L. Berman  
23 Seth L. Berman, Esq. (*admitted pro hac vice*)  
24 *Attorneys for Plaintiff Yellowcake, Inc., and*  
25 *Counterdefendants Colonize Media, Inc., and*  
26 *Jose David Hernandez*

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1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   **I. INTRODUCTION**

3                   This is a case involving the infringement of a number of copyrighted sound  
 4 recordings owned by Plaintiff Yellowcake, Inc., (“Yellowcake” or “Plaintiff”) comprising albums by artist and Counterdefendant Jesus Chavez Sr. (“Chavez”),  
 5 founder and principal of the musical ensemble known as Los Originales De San Juan,  
 6 (“Yellowcake’s Copyrighted Sound Recordings”). Defendant/Counterclaimant Hyphy  
 7 Music, Inc., (“Hyphy” or “Defendant/Counterclaimant”) commercially exploited  
 8 Yellowcake’s Copyrighted Sound Recordings without authorization or license. Despite  
 9 due demand by Yellowcake, Hyphy refused to cease its infringing activity, necessitating  
 10 the filing of this action. Having no valid defense, Hyphy has asserted a number of  
 11 counterclaims to gain leverage in this litigation and as a stalling tactic. These are  
 12 spurious counterclaims which are not substantively supported by any law or evidence.  
 13 As such, they should be dismissed under Federal Rule of Civil Procedure (“FRCP”)  
 14 12(b)(6).

15                   Specifically, Hyphy’s First Amended Counterclaims for copyright infringement  
 16 and all its state law claims arise from an alleged oral agreement (ECF 15, ¶ 16) between  
 17 Hyphy and Counterdefendant Chavez, wherein Chavez allegedly previously transferred  
 18 ownership of the works referred to herein as Yellowcake’s Copyrighted Sound  
 19 Recordings, to Hyphy. This alleged oral contract is invalid and unenforceable. Transfers  
 20 of copyright ownership must be in writing under 17 U.S.C. § 204(a), as well as  
 21 California’s Statute of Frauds (Cal. Civ. Code § 1624(a)(1)). Ownership of a work for  
 22 hire also requires a written agreement as defined in 17 U.S.C. § 101. Because there is  
 23 no written agreement between Hyphy and Chavez, which is essential to establishing  
 24 ownership of, or transferring title to the copyright registrations to Hyphy, and Hyphy  
 25 does not plead facts as to why Plaintiff Yellowcake and Counterdefendants Colonize  
 26 and Hernandez would be aware of the existence and terms of the alleged oral agreement,

27                   ///

1 all of Hyphy's state law claims, founded upon this same invalid and unenforceable oral  
 2 contract, should be dismissed as well.

3 Accordingly, Plaintiff/Counterdefendants are moving to dismiss Hyphy's First  
 4 Amended Counterclaims numbered 1, 3, 4, 5, 6, and 7, to the extent that they arise from  
 5 allegations of infringement pertaining to Yellowcake's Copyrighted Sound Recordings,  
 6 which Hyphy claims ownership of pursuant to its alleged oral agreement with Chavez.<sup>1</sup>

7 **II. FACTUAL AND PROCEDURAL BACKGROUND**

8 Plaintiff Yellowcake is primarily engaged in the business of exploiting intellectual  
 9 property rights. (ECF 1, ¶ 10). Counterdefendant Colonize is a company primarily  
 10 engaged in the business of digital music distribution. Counterdefendant Hernandez is a  
 11 principal of both Colonize and Yellowcake. (ECF 15, ¶ 5). On or about March 21, 2019,  
 12 Yellowcake and Counterdefendant Chavez entered into an Asset Purchase and  
 13 Assignment Agreement (hereinafter referred to as "the APA Agreement") whereby  
 14 Yellowcake purchased the entirety of Chavez's ownership of the rights, title and interest  
 15 in the sound recordings that comprise the albums of Chavez's musical group Los  
 16 Originales De San Juan (hereinafter referred to as "Yellowcake's Copyrighted Sound  
 17 Recordings").

18 Following that transaction, Yellowcake complied in all respects with the  
 19 provisions of the Copyright Act, 17 U.S.C. § 101 *et seq.*, by registering copyrights for  
 20 the sound recordings that comprise Yellowcake's Copyrighted Sound Recordings and  
 21 recording the written assignment of the Copyrighted Sound Recordings with the United  
 22 States Copyright Office. As a result, Plaintiff was issued a Certificate of Registration  
 23 and Registration Number for each copyrighted sound recording. *See* ECF 1, ¶¶ 12, 13,  
 24 22; *Ex. "A"* to ECF 1, annexed to the accompanying Declaration of Seth L. Berman,

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26  
 27 1 Yellowcake, Colonize and Hernandez are not moving to dismiss Hyphy's second cause of  
 28 action in its Amended Counterclaims as it pertains to certain album Cover Art, registered as  
 separate copyrights from the sound recordings.

1 Esq., (“Berman Decl.”) as Exhibit “A”. All of Yellowcake’s Copyrighted Works are  
2 and were published with a copyright notice. (ECF 1, ¶ 14).

3 Notwithstanding, Yellowcake came to learn that Defendant/Counterclaimant  
4 Hyphy was engaging in unauthorized exploitations of Yellowcake’s Copyrighted Sound  
5 Recordings in violation of Yellowcake’s exclusive rights under 17 U.S.C. § 106 by  
6 selling, reproducing, synchronizing, distributing and publicly performing the  
7 Copyrighted Sound Recordings via digital transmission on online platforms. (ECF 1, ¶  
8 15). In addition, Yellowcake learned that Hyphy unlawfully created and/or uploaded  
9 and/or facilitated the uploading of videos containing unauthorized derivative works of  
10 Yellowcake’s Copyrighted Sound Recordings to the www.YouTube.com website. (ECF  
11 1, ¶ 16).

12 In or around May and June 2020, Plaintiff sent Defendant a cease and desist letter  
13 in which Plaintiff notified Defendant of its unauthorized exploitation of Yellowcake’s  
14 Copyrighted Sound Recordings. Nevertheless, despite being on notice of its  
15 infringement, Hyphy has continued its unauthorized exploitation of Yellowcake’s  
16 Copyrighted Sound Recordings and continues to benefit from said unauthorized  
17 exploitations to date (ECF 1, ¶¶ 17-19), all to Yellowcake’s detriment.

18 Faced with Defendant/Counterclaimant’s refusal to cease exploiting its  
19 Copyrighted Sound Recordings, Yellowcake filed this action on July 16, 2020, in the  
20 United States District Court for the Eastern District of California. Berman Decl., Ex.  
21 “A” (ECF 1). Yellowcake’s Complaint asserted a claim of federal copyright  
22 infringement and sought related injunctive relief.

23 On August 19, 2020, Hyphy filed its Answer (ECF 6), annexed to the Berman  
24 Decl., as Exhibit “B”. Having no valid defense to raise in its Answer, Hyphy also filed  
25 baseless and fabricated Counterclaims (ECF 7) on August 19, 2020, against Plaintiff  
26 Yellowcake and Counterdefendants Colonize and Hernandez, alleging federal copyright  
27 infringement and seeking related injunctive relief, as well as state law claims of unfair  
28 competition under Cal. Bus. & Prof. Code § 17200, intentional interference with

1 prospective business advantage, intentional interference with contractual relations, and  
 2 conversion arising out of Hyphy's alleged, yet invalid, oral agreement with Chavez. *See,*  
 3 Exhibit "C" to the Berman Decl. On August 28, 2020, Hyphy filed its First Amended  
 4 Counterclaims (ECF 15) annexed to the Berman Decl., as Exhibit "D", alleging identical  
 5 counterclaims..

6 Plaintiff/Counterdefendants now move to dismiss Hyphy's First Amended  
 7 Counterclaims numbered 1, 3, 4, 5, 6, and 7, as these causes of action arise from and are  
 8 based on, nothing more than an allegation of an unenforceable oral license between  
 9 Hyphy and Chavez.

### 10     **III. ARGUMENT**

#### 11     **A. Rule 12(b)(6) Legal Standard**

12 To directly quote this Court's decisions on motions to dismiss based on Federal  
 13 Rule of Civil Procedure ("FRCP") 12(b)(6):

14     "A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
 15 Procedure tests the sufficiency of the complaint. Dismissal of the complaint or of any  
 16 claim within it can be based on the lack of a cognizable legal theory or the absence of  
 17 sufficient facts alleged under a cognizable legal theory. In considering a motion to  
 18 dismiss for failure to state a claim, the court accepts as true all material allegations in  
 19 the complaint and construes those allegations, as well as the reasonable inferences that  
 20 can be drawn from them, in the light most favorable to the plaintiff." *Clark v.*  
*Amazon.com*, No. CIVS052187GEBDADPS, 2006 WL 8458917, at \*1 (E.D. Cal. Apr.  
 21 20, 2006) (internal quotations and citations omitted).

22     "However, the court need not assume the truth of legal conclusions cast in the  
 23 form of factual allegations. [...] Moreover, it is inappropriate to assume that the plaintiff  
 24 can prove facts which it has not alleged or that the defendants have violated the ... laws  
 25 in ways that have not been alleged." *Mora v. Zeta Interactive Corp.*, No.  
 26 116CV00198DADSAB, 2016 WL 3477222, at \*2 (E.D. Cal. June 27, 2016) (internal  
 27 quotations and citations omitted).

1       Where “it appears to a certainty that the plaintiff can prove no set of facts in  
2 support of her claim that would entitle her to relief,” dismissal under Rule 12(b)(6) is  
3 appropriate. *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984). This is one  
4 such case. As set forth below, it is obvious, in fact, nearly certain, that the facts alleged  
5 by Hyphy do not support any of its amended counterclaims against Counterdefendants  
6 Yellowcake, Colonize, and Hernandez. As such, dismissal of Hyphy’s First Amended  
7 Counterclaims numbered 1, 3, 4, 5, 6, and 7, is appropriate.

**B. Hyphy's Alleged Transfers of Copyright Ownership Are Invalid, Barring Its First Amended Counterclaim for Copyright Infringement and Third Amended Counterclaim for Related Injunctive Relief under 17 U.S.C. § 101 *et seq.***

“To prove copyright infringement, a plaintiff must establish the following: (1) ownership of the allegedly infringed product; and (2) the defendant’s exploitation of at least one exclusive right granted to the copyright owner under 17 U.S.C. § 106.” *Bangkok Broad. & T.V. Co. v. IPTV Corp.*, 742 F. Supp. 2d 1101, 1109–10 (C.D. Cal. 2010), citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 715, amended on reh’g, 508 F.3d 1146 (9th Cir. 2007).

Hyphy fails to establish the first element: valid ownership of the registered copyrights allegedly infringed. Hyphy purports to make its ownership claim by alleging an oral agreement with the artist, Counterdefendant Chavez, whose performance created the entirety of the content of the sound recording copyrights at issue. (ECF 15, ¶ 16).

As the author of the musical performances without which the disputed sound recordings would not exist, Chavez has an ownership interest in the sound recordings allowing him to transfer his ownership interest to Yellowcake. Chavez's written assignment of ownership of the sound recordings to Yellowcake is memorialized in their APA Agreement, as well as in an assignment recorded with the United States Copyright Office, Document No. V9970D519. The Copyright Office's public information regarding recordation of this assignment is attached to the Berman Decl., as Exhibit "E".

1       In contrast, Hyphy's First Amended Counterclaims are based on an allegation of  
 2 an oral agreement between Hyphy and Chavez which is the sole foundation for Hyphy's  
 3 allegations that it owns the sound recording copyrights. (ECF 15, ¶ 16). However,  
 4 ownership of copyrights cannot be transferred by oral agreement. 17 U.S.C. § 204(a)  
 5 states: "A transfer of copyright ownership, other than by operation of law, is not valid  
 6 unless an instrument of conveyance, or a note or memorandum of the transfer, is in  
 7 writing and signed by the owner of the rights conveyed or such owner's duly authorized  
 8 agent." As such, Hyphy has no ownership of Yellowcake's Copyrighted Sound  
 9 Recordings and Yellowcake, Colonize and Hernandez move to dismiss Hyphy's First  
 10 Amended Counterclaims numbered 1 and 3, based on the Copyright Act.

11       "[S]ection 204(a) of the Copyright Act invalidates a purported transfer of  
 12 ownership unless it is in writing." *Bangkok Broad. & T.V. Co.*, 742 F. Supp. 2d at 1110–  
 13 11, citing *Konigsberg Int'l, Inc. v. Rice*, 16 F.3d 355, 357 (9th Cir. 1994) ("[A] transfer  
 14 of copyright is simply 'not valid' without a writing."); *Weinstein Co. v. Smokewood  
 15 Entm't Group, LLC*, 664 F.Supp.2d 332 (S.D.N.Y. 2009) ("A writing evidencing the  
 16 transfer of copyright ownership need not be lengthy or detailed, but it must evidence the  
 17 transfer with reasonable clarity.").

18       "Section 204 ensures that the creator of a work will not give away his copyright  
 19 inadvertently and forces a party who wants to use the copyrighted work to negotiate with  
 20 the creator to determine precisely what rights are being transferred and at what price."  
 21 *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990).

22       Section 204 is further supported by the requirement that works for hire may only  
 23 be so designated by written agreement. 17 U.S.C. § 101. "[S]ection 101's requirement  
 24 of a written statement for copyright ownership of works for hire "is not merely a statute  
 25 of frauds"; its second purpose is "to make the ownership of property rights in intellectual  
 26 property clear and definite, so that such property will be readily marketable."  
 27 *Konigsberg*, 16 F.3d at 357 (internal citations omitted).

28       ///

If there were written transfers of ownership of the copyrights to Hyphy in the form of written assignments of ownership or work for hire agreements, these documents would have made it clear that Hyphy would have had the ownership rights that would have given it the further right to market the sound recordings. In the absence of such documentation it is clear that Chavez had the right to transfer his ownership of the sound recordings to Yellowcake, including the right to sell and distribute those sound recordings.

Hyphy admits in its pleadings that its ownership rights in the copyright registrations at issue arises from its February 2013 oral agreement with Chavez (ECF 15, ¶ 16). Hyphy does not plead that there were any written agreements with Chavez regarding the ownership and use of the sound recording copyrights at issue. At best, all that can arise from an oral agreement is a non-exclusive license of the use of the sound recordings to Hyphy. *Effects*, 908 F.2d at 558-59. 17 U.S.C. § 101 specifically excludes non-exclusive licenses from the definition of what constitutes a “transfer of copyright ownership.”

Since Hyphy cannot rely on its oral license agreement with Chavez to establish exclusive ownership rights in the sound recordings, its first amended counterclaim against Yellowcake for copyright infringement of the sound recordings, and third amended counterclaim for related injunctive relief, fail to state a claim and must be dismissed.

**C. Hyphy’s Amended Counterclaims for Intentional Interference with Contractual Relations, Intentional Interference with Prospective Business Advantage, Unfair Competition under Cal. Bus. & Prof. Code § 17200 and Conversion are Barred by the Statute of Frauds**

Under California Civil Code § 1622, contracts “required by statute to be in writing” may not be oral agreements. Under Cal. Civ. Code § 1624(a)(1), “The statute of frauds requires a written agreement if such agreement “by its terms is not to be

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1 performed within a year from the making thereof.” *Lemos v. Alderwoods Grp., Inc.*, No.  
 2 106CV-01152-OWW-NEW, 2007 WL 2254363, at \*5 (E.D. Cal. Aug. 3, 2007).

3 As set forth below, Hyphy’s amended counterclaims for intentional interference  
 4 with prospective business advantage, intentional interference with contractual relations,  
 5 unfair competition under Cal. Bus. & Prof. Code § 17200, and conversion all rely on  
 6 Hyphy being able to establish written, contract-based ownership of the copyrights at  
 7 issue herein. Hyphy’s claim of copyright ownership via transfer is premised on a five-  
 8 year oral agreement, required by statute (17 U.S.C. §§ 101 and 204; Cal. Civ. Code §  
 9 1624(a)(1)) to be in writing. (ECF 15, ¶ 16). Clearly this agreement, by the five-year  
 10 term alleged, could not have been performed within one year, does not satisfy the statute  
 11 of frauds, and is invalid and unenforceable.

12 Even if the state statute of frauds is not sufficient, copyright law creates a unique  
 13 instance in which both Section 101 and Section 204 of the Copyright Act function as  
 14 statutes of frauds. Under the facts as pleaded, Hyphy cannot show that its amended  
 15 counterclaims can escape dismissal under the combination of the three statutes of frauds.  
 16 “Although section 204 is often referred to as the ‘copyright statute of frauds,’ it actually  
 17 differs materially from state statute of frauds. Even when taking into account the fact  
 18 that state statute of frauds may be satisfied by a writing not intended as a memorandum  
 19 of contract,[...] section 204 may not.” *Konigsberg*, 16 F.3d at 357 (internal citation  
 20 omitted). As fully stated above, “[S]ection 101’s requirement of a written statement for  
 21 copyright ownership of works for hire ‘is not merely a statute of frauds,’” its additional  
 22 purpose is to establish, without doubt, the ownership of intellectual property, thereby  
 23 clearing obstacles that would otherwise interfere with the intellectual property’s  
 24 marketability. *See, id.*

25 As such, Hyphy’s amended counterclaims for intentional interference with  
 26 prospective business advantage, intentional interference with contractual relations,  
 27 unfair competition under Cal. Bus. & Prof. Code § 17200, and conversion, should be  
 28

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1 dismissed, as the oral contract on which these amended counterclaims are alleged is  
 2 invalid and unenforceable.

3 **D. Hyphy's Amended Counterclaims for Intentional Interference with  
 4 Contractual Relations, Intentional Interference with Prospective  
 5 Business Advantage, Cal. Bus. & Prof. Code § 17200, and Conversion  
 6 are Preempted by the Copyright Act**

7 Hyphy's state law property-based amended counterclaims are preempted by the  
 8 Copyright Act. A state law cause of action is preempted by the Copyright Act if two  
 9 elements are present. First, the rights that a claimant asserts under state law must be  
 10 "rights that are equivalent" to those protected by the Copyright Act. "Whether a claim  
 11 is preempted under Section 301 does not turn on what rights the alleged infringer  
 12 possesses, but on whether the rights asserted by the plaintiff are equivalent to any of the  
 13 exclusive rights within the general scope of the copyright. The question is whether the  
 14 rights are works of authorship fixed in a tangible medium of expression and come within  
 15 the subject matter of the Copyright Act." *Jules Jordan Video, Inc. v. 144942 Canada*  
 16 *Inc.*, 617 F.3d 1146, 1154–55 (9th Cir. 2010)

17 Second, the work involved must fall within the "subject matter" of the Copyright  
 18 Act as set forth in 17 U.S.C. §§ 102 and 103." *Kodadek v. MTV Networks, Inc.*, 152 F.3d  
 19 1209, 1212 (9th Cir. 1998); *see also* 17 U.S.C. § 301. A claim will not lie with the scope  
 20 of copyright "if qualitatively other elements are required, instead of or in addition to the  
 21 acts of reproduction, performance, distribution or display, in order to constitute a state  
 22 created cause of action," *Trenton v. Infinity Broad. Corp.*, 865 F. Supp. 1416, 1428 (C.D.  
 23 Cal. 1994) (internal citation omitted).

24 Intentional interference with prospective business advantage, intentional  
 25 interference with contractual relations, unfair competition under Cal. Bus. & Prof. Code  
 26 § 17200, and conversion are property-based claims. In essence, a plaintiff alleges rights  
 27 in property imperative to its business, and a defendant has interfered with that right. *Id.*,  
 28 at 1428. The elements of these property-based causes of action are not qualitatively

1 different from the elements of copyright infringement claims and are preempted under  
 2 Section 301 of the Copyright Act. *Id.* Regardless of whether or not Hyphy has pleaded  
 3 all the elements of each cause of action, the facts of Hyphy's amended counterclaims  
 4 themselves concede that its state law causes of action are based upon the same rights  
 5 enumerated in Section 106 of the Copyright Act.

6 Section 106 states, "the owner of copyright under this title has the exclusive rights  
 7 to do and to authorize any of the following" with its copyrighted work: 1) reproduce the  
 8 copyrighted work, 2) prepare derivative works based on the copyrighted work; 3)  
 9 distribute copies of the copyrighted work in exchange for compensation; 4) publicly  
 10 perform the copyrighted work; 5) publicly display the copyrighted work, and 6) in the  
 11 case of sound recordings, to publicly perform the copyrighted work by means of digital  
 12 transmission.

13 By name, interference with prospective economic advantage implies that a  
 14 claimant business's right to property imperative to its operation has been interfered with  
 15 by an opposing party. In Hyphy's amended counterclaim for intentional interference  
 16 with prospective business advantage, Hyphy complains that Yellowcake interfered with  
 17 Hyphy's acts of "uploading and commercially exploiting the Los Originales Albums [,]  
 18 which generated substantial views" on the website www.Youtube.com. (ECF 15, ¶ 56).  
 19 The acts that Hyphy alleges that Yellowcake interfered with are equivalent to the Section  
 20 106 acts of reproducing, distributing and performing by means of digital transmission  
 21 the sound recordings at issue herein. *See*, 17 U.S.C. §§ 106(1), (3) and (6).

22 To state a claim for intentional interference with contractual relations, an obvious  
 23 element of the claim is that the claimant must allege the existence of a contract. *See, e.g.,*  
*24 UMG Recordings, Inc. v. Global Eagle Entertainment, Inc.* 117 F.Supp.3d 1092, 1115  
 25 (C.D. Cal. 2015). In Hyphy's amended counterclaim for intentional interference with  
 26 contractual relations, Hyphy alleges that Yellowcake interfered with Hyphy's  
 27 contractual relations with Chavez, to wit, the oral agreement by which Hyphy claims  
 28 ownership of Yellowcake's Copyrighted Sound Recordings. (ECF 15, ¶ 16). Since the

1 interfering acts concerned an alleged contract concerning ownership of copyrights,  
 2 logically such a claim encompasses all six of the rights enumerated in Section 106 of the  
 3 Copyright Act. (ECF 15, ¶¶ 62-65); *see also*, 17 U.S.C. §§ 106(1)-(6).

4 *G&G Closed Circuit Events, LLC v. Parker* states, “A state law unfair competition  
 5 claim can be preempted by copyright law if the unfair competition claim is based solely  
 6 on rights that are protected by federal copyright law.” No. 20-CV-1017-CAB-MDD,  
 7 2020 WL 4365887, at \*2 (S.D. Cal. July 30, 2020) (internal citations omitted). In  
 8 Hyphy’s amended counterclaim for unfair competition pursuant to Cal. Bus. & Prof.  
 9 Code § 17200, the unfair acts alleged by Hyphy are the same acts as those enumerated  
 10 in 17 U.S.C. § 106, which constitute a claim under the Copyright Act. Hyphy alleges  
 11 that Plaintiff and Counterdefendants have been “reproducing and performing, or  
 12 benefitting financially from” Yellowcake’s Copyrighted Sound Recordings (otherwise  
 13 known as the sound recordings contained on the Los Originales Albums, or “Masters”  
 14 as Hyphy refers to them), and that Hyphy is owed money for that. (ECF 15, ¶ 68); 17  
 15 U.S.C. §§ 106(1), (3) and (6).

16 In a counterclaim for conversion, the elements of that claim include a claimant’s  
 17 ownership of the intellectual property at issue, and a defendant’s disposal thereof,  
 18 interfering with the claimant’s ownership rights. *See, Dallas & Lashmi, Inc. v. 7-Eleven,*  
 19 *Inc.*, 112 F. Supp. 3d 1048, 1060 (C.D. Cal. 2015). In this instance, Hyphy alleges that  
 20 Yellowcake “intentionally interfered with Counterclaimant’s ownership and rights” in  
 21 the sound recordings at issue, a claim encompassing all six of the ownership rights  
 22 enumerated in Section 106 of the Copyright Act. (ECF 15, ¶ 74); 17 U.S.C. §§ 106(1)-  
 23 (6). Hyphy further alleges that Yellowcake disposed of the disputed sound recordings  
 24 through “use and exploitation”, again, an allegation encompassing all of the rights  
 25 enumerated in Section 106 of the Copyright Act. *Id.*

26 Furthermore, even if the issue of preemption was eliminated by the dismissal of  
 27 Hyphy’s federal claims, “A district court may, at its discretion, decline to exercise  
 28 supplemental jurisdiction over remaining state law claims [...] as doing so would most

1 sensibly serve the values of economy, convenience, fairness and comity.” *Trenton*, 865  
 2 F. Supp. at 1427; *see also*, 28 U.S.C. § 1367(c)(3). Where a Court has dismissed all  
 3 claims over which it has original jurisdiction, at its discretion it may “decline to exercise  
 4 supplementary jurisdiction over the remaining state causes of action where doing so  
 5 would most sensibly serve the values of economy, convenience, fairness and comity.”  
 6 *Id.*, citing *Executive Software North America, Inc. v. U.S.D.C.*, 24 F.3d 1545 (9th Cir.  
 7 1994).

#### 8       **IV. CONCLUSION**

9                  As abundantly demonstrated above, Defendant/Counterclaimant Hyphy has failed  
 10 to state a cause of action under Federal Rule of Civil Procedure 12(b)(6) in each of its  
 11 First Amended Counterclaims that Yellowcake, Colonize and Hernandez seek to dismiss  
 12 herein.

13                  For all of the foregoing reasons, it is respectfully requested that this Court grant  
 14 Plaintiff/Counterdefendant Yellowcake, Colonize and Hernandez’s Motion to Dismiss  
 15 Defendant/Counterclaimant Hyphy’s First Amended Counterclaims numbered 1, 3, 4,  
 16 5, 6, and 7, for Direct Copyright Infringement Under 17 U.S.C. § 101 *et seq.* “as to the  
 17 Los Originales Albums” against Yellowcake and Colonize and related Temporary,  
 18 Permanent, and Injunctive Relief against Yellowcake and Colonize; Intentional  
 19 Interference with Prospective Business Advantage against Yellowcake and Colonize;  
 20 Intentional Interference with Contractual Relations against Hernandez, Yellowcake, and  
 21 Colonize; Unfair Competition Under California Business and Professions Code § 17200  
 22 against Yellowcake, Colonize, and Hernandez; and Conversion against Yellowcake,  
 23 respectively, as well as such other and further relief as the Court may deem just and  
 24 proper.

25                  ///

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28                  ///

Dated: October 2, 2020

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system on this 2nd day of October 2020, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those that are indicated as non-registered participants, if any.

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